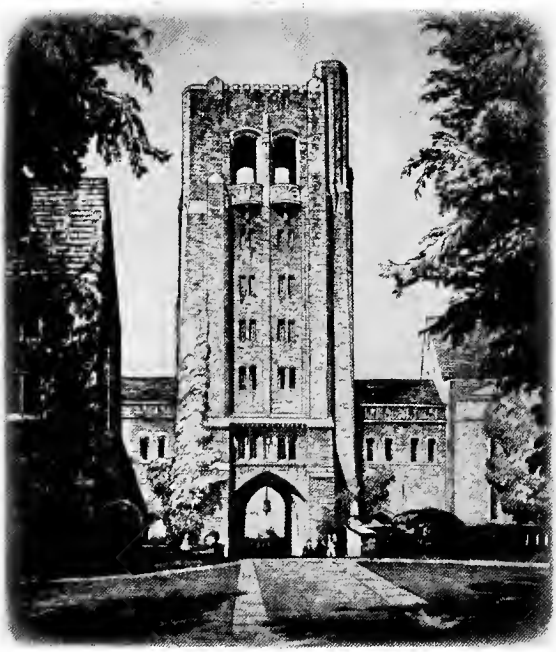
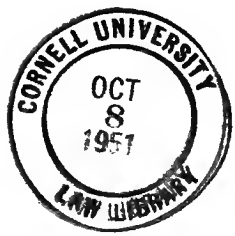
METHODS OF LEGISLATION

SIR COURTENAY ILBERT.

UNIVERSITY OF LONDON PRESS





METHODS OF LEGISLATION

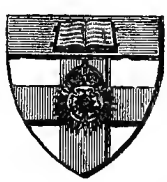
University of London
(Faculty of Laws)

METHODS OF LEGISLATION

A LECTURE DELIVERED BEFORE THE UNIVERSITY OF LONDON ON OCTOBER 25, 1911

BY

SIR COURTENAY ILBERT
G.C.B.



University of London Press
PUBLISHED FOR THE UNIVERSITY OF LONDON PRESS, LTD.
BY HODDER & STOUGHTON, WARWICK SQUARE, E.C.
1912

HODDER AND STOUGHTON

PUBLISHERS TO

THE UNIVERSITY OF LONDON PRESS

METHODS OF LEGISLATION

I HAVE undertaken to discourse to you on methods of legislation, or, if you prefer the phrase, the mechanics of law-making. Perhaps I ought to apologize to you for having selected so dry a subject, for the branch of law with which I have to deal is not that which is most attractive or important to the ordinary lawyer. I do not propose to touch on the origin and development of those great principles of law and equity which are based on the ways, the usages, the understandings of the people or of different classes of the

community, and which have been formulated by successive generations of great judges and learned jurists. What I have to deal with is the law which is enacted by the legislature, including the rules made by persons or bodies deriving their authority from the legislature, but not what is sometimes called judge-made law, that is to say the interpretation, development and application of common law or enacted law. It is with the making, and not with the interpretation, of enacted law that I am concerned.

And the questions which I want you to consider are how these enacted laws are in fact made in civilized countries, what different methods of making them are adopted, what advantages may be claimed for the several methods, and what are their defects—a large subject, and I must con-

tent myself with touching superficially on some of its more important aspects.

But the task of survey and comparison is materially facilitated by two things. The first is, that there is an agreement among all civilized nations as to the general principles on which legislative procedure should be founded. A modern law is not brought down from Sinai, or imposed by the will of an irresponsible despot. Every important law must, before it takes its final shape, be submitted to the scrutiny and criticism of, and be liable to amendment and rejection by, a popular assembly elected for that purpose. The extent to which this process of scrutiny, criticism and amendment is applied, and the methods by which it is applied, differ according to the nature of the subject-matter, and the procedure, habits and idiosyncrasies of the legislature.

The subject of a law may be so technical, and popular confidence in the skill, care and ability of those who prepared it may be so great, that it passes through the legislature practically without criticism or alteration. Some of the great codifying measures of recent times have had this good fortune, though it must be remembered that the German Civil Code, perhaps the greatest, and certainly one of the most carefully prepared, of all these measures, underwent not only effective criticism, but substantial alteration, in its passage through the German Reichstag. On the other hand, a measure proposing important administrative or fiscal changes, restricting or regulating the freedom of action of any class of the community, or materially affecting their economic condition, ought to undergo, and is pretty certain to undergo,

severe scrutiny by the representatives of the people. But liability to this scrutiny exists in all cases, and one of the most difficult of the problems of modern legislation is how to reconcile the right of criticism and amendment which is properly claimed by a popular legislative assembly with the precision of language, the elegance and symmetry of form, which are the characteristics of a good law.

General agreement as to the broad principles by which legislative procedure should be guided is, then, one of the things which facilitate comparison. Another is that both the constitution and the procedure of all modern legislatures, with a very few exceptions, may be traced back to a single prototype, the Parliament which sits at Westminster.

Upon the relations of affiliation borne

to the constitution of the British Parliament by the constitution of the American Congress and of the legislature in the British dominions it is unnecessary to dwell. And it is a commonplace of history that when the constitutions of European countries were being refashioned after the subsidence of the Napoleonic deluge in 1815 the British Parliament, with its two houses, was generally adopted as a pattern.

As regards parliamentary procedure you all know that in every self-governing dominion of the British Empire the instrument of constitution always contains a provision that the procedure of the legislature is, in the absence of specific direction, to be in accordance with parliamentary procedure in England, and that the standing orders are based on those in force at West-

minster and on the procedure described in Erskine May's great treatise.[1] But about the relation between parliamentary procedure in England and in foreign countries it may be worth while to say a little more. First, as to the United States at the end of the eighteenth century. Thomas Jefferson, when Vice-President of the United States, and therefore President of the Senate, compiled for the use of the Senate a manual of procedure which was based on the practice, rulings and precedents of the English Parliament. Since then the procedure of both branches of Congress has been largely modified by subsequent orders, rulings and

[1] The procedure of the Canadian House of Commons at Ottawa follows very closely that of the House of Commons at Westminster. But there are some racy touches of the vernacular. A member who objects to the second reading of a Bill does not move that it be read a second time that day six months. He moves that it be "given a six months' hoist."

precedents, but Jefferson's manual is still to be found embedded as a kernel in the stout volume which answers more or less to the English "May," and several curious traces of English eighteenth-century procedure still survive at Washington. For instance, the procedure at conferences on subjects of difference between the Senate and the House of Representatives may be traced back to the rules which once regulated the conferences, now obsolete, between Lords and Commons at Westminster, though it need hardly be said that at these conferences senators do not sit in little cocked hats whilst members of the other House stand bareheaded.

On the historical relation between English and French parliamentary procedure I should like to quote the accounts given by two men, each of whom was

entitled to speak with high authority. You are probably familiar with the name of Étienne Dumont, the citizen of Geneva who was the friend of Romilly and the interpreter of Bentham. At the outbreak of the French Revolution in 1789, Dumont was in Paris, and was in close and intimate relations with Mirabeau. No one was a greater adept at picking other men's brains than that unprincipled genius, and Dumont was largely employed by him in writing his speeches, and composing the literature which he scattered broadcast, and generally in helping him in his work with the National Assembly. In fact, he devilled for Mirabeau on an extensive scale. One of the first things required was to devise some kind of procedure for that new-born and unorganized body, the National Assembly, and this is what Dumont, in

his *Souvenirs sur Mirabeau*, tells us about the proposals on this subject—

"Romilly," he says, "had done a very interesting piece of work on the rules observed by the House of Commons in England. These rules are the fruit of reasoned experience, and the more they are examined the more they are admired. They are customs carefully preserved in a body very averse to innovations. They are not reduced to writing; to state them requires great care and great trouble. Romilly's little code indicated the best way of putting questions, of preparing motions, of debating them, of taking votes, of appointing committees, of passing business through its various stages, in a word, all the tactics of a political assembly. I had translated this treatise at the beginning of the States General. Mirabeau presented it to the

House and laid it on the table when there was a proposal to draw up rules of procedure for the National Assembly. 'We are not English, and we don't want anything English.' This was the reply made to him."

So far Dumont. Now let us hear what was said about the same subject many years afterwards by a great French statesman. In the summer of 1848 Guizot was in England, having been driven from France by the Revolution of February. In that summer a select committee of the House of Commons was sitting to consider the public business of the House, and on the 31st of July Guizot was called to give evidence before it. Evelyn Denison, afterwards Speaker, was in the chair, and the first question—a very leading question—which he put to Guizot, was this: "Were

the rules and orders of the French Chamber originally very nearly the same as those of the House of Commons?"

Guizot's answer was: "Yes. In the beginning of our constituent assembly at the Revolution, Mirabeau asked Étienne Dumont to give him a sketch of the proceedings of the English House of Commons, and Étienne Dumont gave to Mirabeau such a sketch, which is printed in a work called *The Tactics of Political Assemblies*, and the sketch of Etienne Dumont became the model of the first rules of our National Assembly. So that in the beginning of our Revolution the proceedings of your House of Commons became the source of ours. In 1814, when the charter was granted by the King" [Louis XVIII] "the same rules were adopted, with some changes."

You will see that the two accounts do not quite tally. Dumont's requires some supplementing; Guizot's a little correction. What really happened seems to have been this. The treatise prepared by Romilly, and translated by Dumont, was published as a pamphlet, and was subsequently absorbed into and incorporated in a larger work which was inspired by Bentham, and based upon his notes, but was written by Dumont, and given by him to the world in 1815 under the title of *La tactique des assemblées législatives*. This work, of which a second edition appeared in 1822, exercised a very great influence on statesmen and on political writers and thinkers, not only in France but in other parts of Europe, and much use was made of the information and suggestions which it contained in framing the rules of procedure

for the European legislatures which came into existence in the first half of the last century.[1] It is to be found in its English form, under the title of an *Essay on Political Tactics*, in the second volume of Bentham's collected works.

Have I gone too much into detail on this subject? If so, my excuses are two. First, it is always interesting to trace the historical relation between the political and administrative institutions of different countries, and to show, as Miss Bateson and others have shown in the case of municipal charters, the cases in which, and the steps by which, they can be traced to a common model, such as the charter granted to the Norman town of Breteuil. And secondly, in a place where Bentham's

[1] *See* Redlich: *Procedure of the House of Commons*, III., 180–183.

memory is deservedly held in special veneration, it is appropriate to illustrate the enormous influence which he exercised both over the form and over the subject-matter of legislation.

And now, having cleared the ground, let me say something about the successive stages through which a legislative measure has to pass before it takes effect as law. We may distinguish four of these stages. 1. The preparation of the measure. 2. Its passage through the legislature. 3. Its formal enactment. 4. Its publication.

On the enormous importance of having the draft of a measure carefully prepared before its submission to a popular legislature, it is unnecessary to dwell. Yet this importance is still imperfectly realized in some civilized countries, and the machinery required for the preparation of drafts which

are intended to become laws is defective or imperfect. In our own country the office of the parliamentary counsel which is responsible for the preparation of government bills dates from 1869. About the quality of the work done by an office with which I was for many years closely connected it would be unbecoming for me to say much. All that I need say is that the work of the office is exceptionally difficult and laborious, that it is done under trying and exhausting conditions, and that, although it is subjected, and properly subjected, to stringent criticism, it has, in the opinion of competent judges, accomplished much in improving the form of our statute law. The office is responsible only for government bills, and for such alterations in bills introduced by private members as are required by the government as conditions for the grant of facilities

in their passage through the legislature. In the number of public bills which succeed in becoming law the proportion of private members' bills is, as is well known, very small, and there are some who regret the small and probably decreasing share taken by the private member in the initiation of measures which are destined to find their place on the Statute-book. I do not myself share that regret. It is for the interest of the public that the laws by which they are to be governed should be carefully prepared, and, though no one would think of proposing to reserve to the government the right of introducing bills, yet it would be impossible to place at the disposal of every private member the services of the trained and skilled staff who assist the government in the preparation of their bills. Of the large number of bills introduced in each session by private members, very few can

hope to profit by the priority given by the ballot on the days reserved for their bills, or to escape the opposition of a single member which is fatal to the chances of slipping through during the time for unopposed business. But they are of great value in suggesting and pressing upon the attention of the legislature and the government proposals for improvement of the law. The suggestions are often in a crude form, but if their principles find favour, they frequently supply materials which form the basis of useful legislation.

About the machinery for the preparation of legislative measures in British dominions, colonies and dependencies much valuable information was collected some years ago, in response to inquiries circulated by the Colonial Office at the instance of the Society of Comparative Legislation, and

the answers were published in the journals of the Society, and summarized in my own book on *Legislative Methods and Forms*. The legislative department of the government of India was established in the same year (1869) as the office of the parliamentary counsel in England, and performs similar work. The methods adopted in the self-governing dominions are various. In some of them there are official draftsmen, usually working under the Attorney-General or attached to his department. In Canada each house has a law clerk, who acts as a legislative draftsman. The law clerk of the senate is appointed by that body. The law clerk of the lower House, in which the great majority of measures are introduced, is appointed by the Speaker. But he is also law clerk of the government, and therefore acts in a

dual capacity, as an officer of the House and as an officer of the executive government. The great self-governing dominions are, of course, responsible both for the form and for the substance of their legislation, but over the legislation of the Crown colonies a good deal of supervision is exercised by the Colonial Office.

But, after all, this apparatus of draftsmen is mere machinery. Good machinery is indispensable, but the best machinery is useless unless it is properly worked. What is required for the preparation of a good law is the bestowal upon it of all the time and all the brain-labour available, especially during the period of gestation, the period before its introduction to the legislature. Those who are responsible for the bestowal of such time and labour are, not the draftsman, who is a mere instrument, though he

must be a capable and intelligent instrument, but the ministers or others who introduce the measure and have to guide it through the House. And unless they perform these duties, the labour of the draftsman is but in vain.

About the methods adopted for the preparation of legislative measures in foreign countries my information is more scanty. In the United States the strict separation between the legislature and the executive makes it impossible to adopt the system under which official draftsmen of the government act in the United Kingdom and in other parts of the British Empire. There are no government bills, and there is no direct responsibility on the part of the government for the preparation, introduction or passage of bills. Every bill is a private member's bill, and their number

is legion. In the sixtieth Congress at Washington 44,500 bills and resolutions in the nature of bills were introduced. But the rate of mortality among them approximates to that among the infant codfish. The vast majority of them perish in the committees to which they are consigned, and their death does not appear to be much regretted. Some proposals have been put forward, and some attempts, about which I should like to know more, have, I believe, been made in Congress and in some of the State legislatures to systematize and improve the method of drafting bills. In some of the States the Governor exercises pretty freely his right of veto to kill bills which are faulty in form or substance, and thus exercises an indirect and negative control over legislation. And perhaps the most hopeful direction in which reform

of the existing system could move would be to employ an official draftsman or staff of draftsmen who should, as in Canada, act under the authority both of the legislature and of the executive government. But it would be presumptuous for me to offer suggestions on this subject. All I can say is that absence of responsibility for the preparation of legislative measures, and absence of security for their conformity to general principles and their consistency with each other, are among the chief defects noted by competent critics in American legislative procedure.

In France the right of initiating legislation belongs to every member of the legislature, but a distinction is drawn between government bills, which are called *projets de lois*, and private members' bills, which are called *propositions de lois*, and there is

some difference between the formalities of introduction and procedure in the two classes. Before the establishment of the Third Republic, and especially under the Consulate and the First and Second Empires, the Council of State played the most important part in the preparation and passage of laws. The Council of State, acting through a legislative committee, made all the laws of the Consulate and the First Empire, including the great Napoleonic Codes. Under the constitution of 1852, that of the Second Empire, the Council superseded the ministers in the task of preparing bills and practically superseded the legislative assembly in the task of examining them. The powers of that assembly were slightly enlarged in 1861, but practically it remained under the tutelage of the Council of State

during the whole of the Second Empire. The Third Republic changed all this and closely clipped the wings of the Council of State. It is still the duty of the Council to advise the government on any legislative proposal submitted to it. But there is no obligation to consult the Council, and the form and progress of a legislative measure are in no way dependent on its approval.

In the German Empire the Reichstag has theoretically the right of initiating legislation, but, as I am informed, by far the larger part of the statutes which it passes are prepared and first discussed by the Bundesrath. They are then sent to the Reichstag, and, if passed by that body, are again submitted to the Bundesrath for approval before they are promulgated by the Emperor.

The German Empire makes great use of expert commissions, such as that which elaborated its great civil code, and it has very competent lawyers upon or attached to its official staff. And I am reminded by Dr. Schuster, in an interesting article which he contributed to a recent number of the *Journal* of the Society of Comparative Legislation, that the text of bills of such magnitude as the bill for consolidating the insurance laws which was then before the German legislature is generally "published a long time—sometimes several years—before the discussion in Parliament begins, so as to give the government an opportunity to introduce such modifications as may seem appropriate after full consideration of the results of public discussion." But I must frankly confess that I am in much ignorance about the methods

actually adopted for the preparation of legislative measures, especially of those for which the government are responsible, whether in France, Germany or elsewhere in Europe, and I should be very grateful for enlightenment on the subject. Information about it could doubtless be obtained by personal inquiry on the part of any one who knew what to ask and where to ask, and, like the practice of government departments in England, it is a subject about which more can be learnt by such inquiry than by consulting text-books. It may very well be that somebody has embodied in a text-book the kind of information which I desiderate, but, if so, I have not come across it.[1]

However a statute is prepared, if it deal with a large subject, it is, and must

[1] *See* Appendix.

be, in its ultimate shape, the product of many minds. There is a delightful chapter in a delightful book which some of you may have read, Professor Gilbert Murray's *Rise of the Greek Epic*, in which the author, for the purpose of supporting his theory of the composition of the *Iliad*, dwells on the difference between an ancient book and a modern book, and describes how an ancient book was worked over, modified, amplified by a succession of writers all belonging to the same school, each merging his individuality in that school. It is a far cry from the *Iliad* to the English Statute-book, and the last thing to which one would compare a modern statute is an early Greek epic. But they have one feature in common, that of impersonality of authorship. We sometimes speak of a learned lawyer, such as

the great conveyancer, Brodie,[1] as having "penned" a particular statute, but most laws, at least those of a comprehensive nature, cannot be assigned to any particular author, and the task of the draftsman, his modest but difficult task, is to work into intelligible and consistent shape materials accumulated during a long course of experience and suggestions gathered from many quarters, and to embody in his draft, as best he may, alterations made in the course of its passage into law. A little while ago I was looking at an important bill, which I hope will become law before the end of the present session,[2] the bill to consolidate with amendments the law of copyright, and I thought that I recognized

[1] I take this opportunity of correcting a slip in my book on *Legislative Methods and Forms*. On p. 80, 'Christie' should be 'Brodie.'

[2] It has since become law.

in it some phrases and turns of expression which struck me as familiar. And then I remembered that as long ago as 1879, before I went to India, I had prepared a comprehensive Copyright Bill for the government, working, of course, upon the basis of pre-existing acts and drafts. Since then copyright has been the subject of international conferences and conventions, of discussions with the governments of foreign countries and of British self-governing dominions, of commissions and departmental committees, and the bill of 1879 has been altered out of knowledge and vastly improved. But some traces of it still remain. This, or something like this, is the history of the early stages of many important legislative measures.

Let us turn from the preparation of bills outside the legislature to the passage of

bills through the legislature. A decisive step in the history of English legislation was the transition from legislation on petition to legislation by bill. In the earliest ages of Parliament the House of Commons —I speak of that House because the other House still retained the character of the King's Council—was not a legislating body but a petitioning body. It presented petitions for the redress of grievances, by legislation or otherwise. The Commons petitioned for a law, they did not make the law. Later on they claimed an authoritative share in the making of laws, and the change is reflected in successive alterations of the enacting formula. Then they went a step further and dictated the terms in which the law for which they asked was to be made. They presented a bill in the form of an act or statute, and said, "This,

and no other, is the law which we want." These two things, the assertion by Parliament of legislative authority, and the substitution of bill for petition, altered the relations between the two factors of English legislature. What had been legislation by the King with the approval of Parliament, became legislation by Parliament with the approval of the King. The Lancastrian kings surrendered a power which the French kings retained, and which even the most powerful of the Tudor monarchs were unable to recover.

About the same time with these changes began the practice of reading a bill three times before it was passed. At what precise date it began, whence it was derived, by whom or by what other procedure, if any, it was suggested, is not known. It began when the records of the two Houses

were the rolls of Parliament, and these rolls are defective evidence on matters of procedure. We find it in existence when the journals began to be kept under the Tudors. At first the readings were, no doubt, real readings, not mere stages of procedure. And it became the practice that the first reading should follow immediately, and, as a matter of course, after introduction; that on the second reading the general principles of the measure should be considered, and, if necessary, debated; that after second reading the bill should go to committee for discussion, and, if necessary, amendment of details; and that the bill as reported back, after such consideration as was necessary, should, if approved, be read a third time.

This practice of three readings, with suitable intervals between them, found its way

into other legislatures which took the procedure of the English Parliament as their model, but there underwent various modifications. The chief differences arise from the more or less extensive use made of committees. The committees of the English Parliament, as we find them in the journals of the sixteenth century, were small committees. A bill would be committed to one or two persons for consideration and report. These persons were called committees, with the accent on the last syllable, as in the case of committees in lunacy. Then larger committees were appointed for the consideration of bills or groups of bills. A committee would often include "all the gentlemen of the long robe," that is to say, all the lawyers who were members of the House. It was not always easy to secure attendance at these committees, and it became the practice to

invite any member who wished to attend. Thus grew up the committees of the whole House, which consisted, potentially, of all the members of the House, but which conducted their proceedings with greater privacy and with less formality than at sittings when the Speaker was in the chair. But attendance at these committees was apt to be scanty, and those who were qualified to take part, and did take part, in their discussions, as indeed in debates when the Speaker was in the chair, were, comparatively speaking, very few. "It must be observed at all times," says Bentham, "that these assemblies" (the assemblies of the House of Commons) "are rarely numerous, that there are few habitual orators, and that these almost always occupy the same place."[1] This passage occurs in a discussion of the comparative advantages

[1] Essay on Political Tactics, *Works*, II. 322.

of speaking from a tribune or rostrum and from the member's ordinary place, and probably refers to the House of Commons as it existed towards the end of the eighteenth or the beginning of the nineteenth century. But it would have applied to the House at a much later date. Last August Mr. Lloyd George gave a concrete illustration of the difference which half a century had made in the habits and proceedings of the House of Commons by putting side by side on the table of the House the slender volume which recorded the divisions on Mr. Gladstone's budget of 1861 and the bulky tome recording the divisions on his own budget of 1909. The growth of newspapers, the advance of education, the enormous increase in the number of those who take an intelligent interest in the proceedings of Parliament, the demand made on

members for public speeches, the capacity for oratory and debate thus acquired, have revolutionized the ways of the House. The silent member, the member described by Mr. Gladstone, who felt that he had exhausted his duty if he made one speech during the interval between two general elections, has now become a rarity. But multitude of orators and readiness of speech at all times and on all topics do not conduce to the despatch of business; and increase in the bulk of legislation, accompanied by increase in the number of those who were anxious to discuss, capable of discussing, and entitled to discuss principles and details of legislative measures, made some reform of legislative procedure imperative.

The first remedy adopted for the congestion of legislative business was the

establishment of two large standing committees to which bills might, by order of the House, be committed after second reading instead of going to a committee of the whole House. A step further in the same direction was taken in 1907. Two things were done. The number of standing committees was doubled—it is now four—and the presumption as to whether a bill should go to a standing committee was reversed. Under the old rules a bill did not go to a standing committee except in pursuance of a special order. Under the new rules all bills, subject to a few exceptions, go to a standing committee, unless the House orders otherwise. The system of standing committees, both before and since 1907, has, on the whole, worked well. Sometimes there is difficulty in securing the attendance of a quorum for a bill

which excites little interest; sometimes the discussions on a bill which excites great interest have been turbulent and protracted. But as a rule the proceedings have been quiet and businesslike. Common sense, and the practice of companies and other associations, suggest that the details of a draft can be better discussed in a small than in a large body, and room can usually be found on every standing committee for every member who is qualified by special interest or knowledge to take part in its proceedings. But when the discussions raise important questions of general principle, as they sometimes do, there is a real difficulty in excluding these questions from the consideration of the whole House, and there is a tendency to meet that difficulty by raising the questions again when the bill as reported by the committee is

considered by the House, a process which involves tedious repetitions of previous debates. The problem is how to reconcile effective control by the House over matters of principle with the delegation to a smaller body of the duty of elaborating details, and a very difficult problem it is. It has sometimes occurred to me that the general discussion of principles which takes place on the second reading of a bill might be supplemented by instructions laying down for the guidance of the committee general rules on particular points of importance, and that thus the issues might be sifted by distinguishing principles from details. I believe that a suggestion to this effect was once thrown out by Mr. Balfour, but he doubtless felt, as we should feel, that there is great risk of any such system, like the old system of permissive instructions

before it was crippled by rulings from the chair, being utilized for purposes of obstruction, and thus tending to lengthen proceedings for which the available time of the House is even now quite inadequate.

No one pretends that the legislative procedure of Parliament, whether allowed to run its normal length, or cut short by application, more or less drastic, of the closure, is satisfactory. But it must be remembered that the problem of legislating through the agency of a representative and popular assembly, the necessity for which is admitted by every free country, has nowhere been satisfactorily solved, and I doubt whether we can from the procedure of other legislatures derive many useful hints for our own. Still the comparison is always instructive.

One of the chief differences, as I have

said before, is in the use made of committees. The United States is the country which seems to have carried the use of committees to the furthest point, and legislation by Congress is legislation by committees of Congress. At the beginning of each session the Speaker of the House of Representatives appoints some fifty odd standing committees on particular subjects, taking care, by the selection of the chairman and the constitution of the committee, that the political party to which he belongs is sufficiently represented on each committee.[1] Every bill when introduced is read formally both a first and a second time, and, without previous discussion in the House, goes to that committee to which, in the opinion of the Speaker, its subject

[1] This was the system under Speaker Cannon. It has been somewhat modified since.

properly belongs. And there it usually remains. If it is fortunate enough to be taken up for consideration by the committee and to emerge, and if, through the favour of the rules committee which gives special facilities for advancing bills in the House, it comes up for debate there, the debate is usually cut short by a very drastic application of the closure. The discussions in committee are private and unreported, those in the House are brief and usually perfunctory, and I believe that most Americans would agree that the amount of sifting which bills undergo in Congress, and the amount of attention and criticism which is brought to bear upon them both inside and outside the legislature, are far less than in the case of bills introduced into the Parliament at Westminster.

Another difference lies in the greater or

less use made of the power of the executive government to supplement parliamentary legislation by means of rules or orders having the effect of law. All free countries recognize the importance of maintaining the principle that a distinction ought to be drawn between the legislative, judicial and executive functions of government, and that these functions ought to be exercised by separate bodies. But they differ very much in the application of this principle. The principle of separation of powers, as it is sometimes called, was a leading tenet in the political philosophy of the eighteenth century, and is nowhere more emphatically affirmed than in the constitution of the United States, with results which are not always conducive to good government. There is always and everywhere a tendency on the part of those responsible for

the three great branches of government respectively, to regard the others as rivals, to fret at limitations on their own powers, and to poach on the provinces of their neighbours. And this tendency is increased and accentuated if too hard and fast a line is drawn between organs and functions which ought to work in harmony with each other, and the relations of which to each other require the most delicate adjustment for their proper working. One result of denying to the legislature at Washington the control which the legislature at Westminster exercises over the executive, is that Congress is always trying to regulate by bill matters of detail which in this country would be left, and in the opinion of most of us would properly be left, to be regulated by administrative action and administrative regulations.

On the relations between the legislature and the judiciary something was said to you last year by Lord Shaw of Dunfermline, and I need not add to what was then so eloquently and forcibly expressed. Nor do I intend to touch to-day on another important and difficult question about which much has been said and written in recent years, the proper relations between the judiciary and the executive, the cases in which and the extent to which the decision of points arising on the construction of statutes or statutory rules may properly be taken out of the jurisdiction of ordinary courts of law and left to the decision of administrative tribunals. It was on the third of the debatable lands that I intended to touch, the border line between legislative and executive action. One day, not long after the revolution of Brumaire, Napoleon

Bonaparte was discussing with Roederer the draft of the famous constitution of the year VIII, the draft which emanated from the brain of Siéyès, which was so altered by Bonaparte as to make it serve his own purposes and defeat those of its author, and under which Bonaparte became First and Cambacérès Second Consul. "A constitution," said Bonaparte, "should be short and——" "Clear," interposed Roederer. "A constitution," repeated Bonaparte with emphasis and without appearing to notice the interruption, "A constitution should be short and obscure." [1] The constitution

[1] I took this story from Vandal, *L'Avénement de Bonaparte*, I. 526, where Roederer, III. 428, is quoted as the authority. But I have since discovered that Dr. Holland Rose (*Life of Napoleon*, I. 349), quoting the same authority, describes the conversation as having taken place, not with Napoleon but with Talleyrand, and as referring, not to the constitution of the year VIII, but to the constitution of the Cisalpine

as finally drafted left many points to be worked out in practice, and was perhaps none the worse for that. Under it, you will remember, the Council of State was charged with the duty of framing laws, the tribunes with the duty of discussing and criticizing the draft of a law, the legislature with the duty of deciding by vote, but without debate, whether it should or should not become a law. "But what is a law?" Bonaparte asked Cambacérès, in the early days of the constitution. "What must be settled by law, and how much can we, the

Republic. Dr. Rose's version appears to be correct. The passage in Roederer runs as follows:—

"Bonaparte m'ayant chargé de rédiger ses idées pour la constitution cisalpine, je lui en présentai deux projets; l'un, fort court, qui se bornait à l'érection des pouvoirs; l'autre, mêlé de dispositions qu'on pouvait laisser à la loi: je priais Talleyrand de conseiller au premier consul de préférer la première, et je lui disais: 'Il faut qu'une constitution soit courte et . . .' j'allais ajouter: 'Claire,' il me coupe la parole, et me dit: 'Oui, courte et obscure.'"

consuls, do by *réglements* in our Council of State, without calling in the aid of the legislature?" Cambacérès' answer was discreetly oracular: "A *réglement* is only the particular application of the law. Law is the general rule made by those who have the right and power to make it." Bonaparte smiled and did not press his question further.[1] He kept this sibylline utterance and pondered it in his heart, and in the later days of the Empire made it the foundation of and justification for his extensive legislation by decrees. If the extent to which decrees can be made is left to the discretion of the executive the power is capable of indefinite extension. The spirit of the constitution of the year VIII still breathes in the French constitutions

[1] Vandal, II. 166, quoting Cambacérès, *Éclaircissements*.

of later dates, and in the other European constitutions modelled on or suggested by those of France. Under all these constitutions the executive government has, and freely exercises, an inherent power of making decrees, *réglements*, and similar orders and regulations which supplement the action of the legislature. For instance, if you take up such a volume as the *Annuaire* of French legislation, published by the French Society of Comparative Legislation, you will find a large amount of space occupied by decrees ranking alongside of ordinary laws. Our Henry VIII was a monarch who entertained views about the functions of the legislature not unlike those of the first Napoleon. He held that Parliament was a useful servant but ought not to be a master, and if his famous Statute of Proclamations had remained on the

English Statute-book the Crown would have had a large power of making laws by proclamations and ordinances which might have altered the course of English history.[1] But the act was repealed in the next reign and has not been revived, and the residuary power of the Crown to legislate by Orders in Council and proclamations has been reduced by usage and by the action of Parliament to very small dimensions. It is true that in modern times a vast amount of legislation is effected every year by means of Orders in Council, and statutory rules and orders. The adoption of these methods has been rendered necessary by the great quantity of administrative legislation which has been the characteristic feature of parliamentary history since the Reform Act of 1832. It has done much

[1] *See* Dicey, *The Law of the Constitution*, 7th ed. p. 48.

to shorten and simplify acts of Parliament, and it is of great value in providing the requisite amount of elasticity in the experimental stages which follow the enactment of a new law. But it is subordinate and derivative legislation. It derives its force from Acts of Parliament, and it is for Parliament to determine, by provisions of the Act, the cases in which, the extent to which, and the conditions under which, the power is to be exercised.

After the Restoration, France borrowed from England the practice of reading a bill three times and continued it until 1875. But France had in 1789, and still has, another parliamentary practice which was not borrowed from England, which she shares with some other European countries, and which was perhaps derived from her pre-revolutionary provincial assemblies. It

is that of dividing the whole chamber up into bureaus. The word *bureau*, as used in French parliamentary language, has two meanings, which are sometimes a little confusing to a foreigner. It is applied to the staff of parliamentary officials, consisting at present of the President, four vice-presidents, eight secretaries, and two quaestors (*questeurs*). But it is also applied to the groups into which the whole chamber is divided. At the beginning of each session, the chamber, which consists at present of 584 members, is divided by lot into two bureaus, of approximately equal numbers, and these bureaus are reshaped by lot every month. The bureaus appear to be at present little more than machinery for the constitution of the commissions or committees to which bills are referred. When a commission is appointed by the

bureaus, each bureau selects from its own body one, two, or three persons to be members of the commission. But under the present practice the commissions are sometimes appointed by the chamber as a whole, like our select committees on public bills and subjects of inquiry, and it is in this way, if I understand the *réglements* rightly, that are appointed the sixteen great permanent commissions, of thirty-three members each, into which, under a standing order of 1902, the chamber is divided at the beginning of each session. In fact, the method of appointing committees by the bureaus, to which there are some obvious objections, seems to be in course of supersession by other methods of appointment.

When a bill is introduced, whether it is a *projet* or a *proposition*, it either goes to the bureaus to be referred by them to a

commission, or goes direct to one of the permanent commissions. By the commission the bill is examined, first in principle, then in detail. The sittings of the commission are private. The commission choose a reporter (*rapporteur*) who is charged with the important duty of formulating the views of the commission which he represents. The report which he prepares is not a mere formal document, but states fully the arguments for and against the proposals accepted. A minister cannot be a member of a commission, and therefore cannot be a *rapporteur*, but the functions of a *rapporteur* are important, and their successful discharge may lead to higher things. M. Anatole Briand made his reputation by his great report on the French Disestablishment Bill. The report of the commission is presented to the House, and

forms the basis of subsequent discussion on the bill. In these discussions the *rapporteur*, as representative of the commission, takes a leading part in supporting their conclusions. In the house itself there must be two deliberations on the bill, separated by an interval of five days. But at the first deliberation a vote is, or may be, taken on the principle of the bill before the House proceeds to the discussion of articles or clauses, and when the articles have been approved at the end of the first deliberation, they are reviewed and pronounced upon at the second deliberation. Thus there are, or may be, as M. Esmein has pointed out,[1] three decisive votes corresponding more or less to the three readings under the old practice.

Any one who is familiar with the English

[1] *Éléments de droit constitutionnel*, 4th ed. p. 824.

parliamentary practice on public bills would probably notice at once three main points of difference in the French practice. (1) A bill goes to a committee before its principles have been discussed in the whole House. In this the French resembles the American practice. (2) The bill is taken out of the hands of the minister or other member who introduces it, and is placed under the control of the commission, who are represented in the House by their *rapporteur*. (3) The report of the commission is a document of an entirely different character from the report on a bill which comes back from an English standing committee.

I shall not ask you to travel with me into the procedure of other European legislatures, partly because the details are technical and would be wearisome, but mainly because I have not that personal

knowledge of the way in which the procedure actually works without which one is apt to slip and go astray.

But I should like to take you back to English legislative machinery, with reference to two questions. First, how far has the English legislature, in recent years, been successful in improving the form of the English statute law? I am speaking of the legislature, not of the draftsman, who does his work as well as he can under existing conditions. But what is it that is mainly responsible for the unintelligible form of many bills, and especially for the abuses of that method of referential legislation, which is so generally criticized? [1] Surely it is the

[1] The practice of legislation by reference is not new, nor is the possible conflict thereon between minister and draftsman. William Pitt writing to George Rose on August 10, 1798, says, "I know that Lowndes" (the government draftsman of the day) has always a rage for putting everything into one Act

chaotic and fragmentary condition of our statute law, which makes an amending act a new and ugly patch on a complicated piece of patchwork. How far has the legislature succeeded in remedying this evil by passing measures of consolidation? These measures attract little interest inside the House, and, in spite of their admitted utility, are not really popular outside it, especially among the older members of the legal profession, for when one has spent laborious days and nights in mastering the old statutes, it is a nuisance to have to familiarize oneself with new language, numbering and arrangement. What progress, then, has the legislature made, or is it making, with this useful but unattractive work?

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of Parliament; whereas, nine times out of ten, the provision would be made much better by reference" (*Rose's Diaries*, I. 216).

Some ten years ago I was disposed to give a gloomy answer to this question, for the machinery of joint committees of the two Houses for the consideration of consolidation bills, from which much had been hoped, appeared to have broken down, and the work had come to a standstill. But to-day I can give a more satisfactory and hopeful answer, for, thanks mainly to the practical interest shown in the subject by the present Lord Chancellor, and to the great pains which he has bestowed upon it, progress has been resumed, and is reasonably good. I hold in my hand a list of consolidation Acts which have become law in recent years, and if one bears in mind the difficulties and obstacles in the way of passing these measures, it is quite an encouraging document. Of these Acts I should like to refer to two in particular. One of them

is the Licensing Consolidation Act of 1910, and I mention it because it deals with a very controversial branch of law, and because, though it was prepared in the Parliamentary Counsel's Office, and received much assistance from the Lord Chancellor, it was piloted through the House of Commons by private members on both sides of the House, and the House accepted their assurance that such alterations as it embodied were only such as are necessarily and properly incidental to the process of consolidation. It supplied gratifying evidence that, in dealing with measures of this kind, the House will place great confidence in its committees, if there is reason to believe that the work of the committees has been carefully and thoroughly done. The other is the Lord Chancellor's Perjury Act of the present

year, which affects an enormous simplification of the law and an enormous clearance away of statutory provisions dealing with one particular subject. I hope that the same process will be applied to other branches of the criminal law, as embodied in statutes.

The other question I should like to ask is this: Can any improvement be made in the machinery for revising the form of a bill after it has passed through the ordeal of committee of the whole House or of a large committee upstairs, or has been allowed, by consent or inadvertence, to pass through its earlier stages without careful examination? Something in this direction is often done when the bill comes before the House for consideration of the report of the committee, and points which are not set right at that stage are often left to be

dealt with by amendments in what is euphemistically described as "another place." How far does the House of Lords perform, how far can it, under existing conditions, be expected to perform, the functions of a revising body? I wish to avoid any approach to dealing with what is the subject of acute political controversy, and therefore I will content myself with two or three brief observations. In the first place a large number, probably a great majority, of the amendments made in the Lords are either agreed upon by the promoters and the opponents or critics of the Bill, or are suggested by the draftsman for the purpose of removing obvious flaws, such as inconsistencies or obscurities, and, in either case, are made without discussion or comment. In such cases the House of Lords acts rather as an instrument than as

an organ of revision. In the next place, it would be easy for the Lords to constitute an effective revising body by forming a small legislative committee. But, lastly, and this must be added by way of warning, it is not easy to combine the functions of a revising body, accepting the principles of a measure, and merely endeavouring, by improvement of form, to give better and fuller effect to those principles, with a claim to exercise co-ordinate legislative authority.

The House of Commons would, it may be surmised, welcome, receive with respect, and be inclined to adopt, suggestions for improvement of their work coming from a competent and impartial critic or body of critics, and would be disposed to allow adequate time for the performance of the work of criticism and revision, even at the cost of delaying the operation of an Act.

But they would look with greater jealousy and suspicion on alterations made by a rival claiming co-equal powers in the field of legislation. Revision is one thing, legislation is another, and it is not easy to combine the two factors.

I must deal briefly with the two remaining stages in the procedure of legislation. What is it that turns a bill into an Act, converts a project of law into an actual law? In all countries, I believe, formal assent by or on behalf of the King, Emperor, President, or other head of the executive authority, is required, and is usually conveyed by signature of the measure as passed by the legislative chambers or chamber. But in Germany, and perhaps elsewhere,[1] questions, speculative rather than practical, have been raised as to whether this

[1] See Laband: *Droit public de l'Empire Allemand*, vol. ii., chap. vi.

signature confers the force of law or merely authority to promulgate.

In France the formula required by the decree of April 6, 1876, is this: "The Senate and the Chamber of Deputies have adopted, the President promulgates the following law (*la loi dont la teneur suit*), and then at the end comes: "The present law discussed (*déliberée*) and adopted by the Senate and by the Chamber of Deputies shall be executed as a law of the State." The venerable English formula which has descended from Plantagenet times shows on its face the steps by which the authority of the King was supplemented by the authority of the two Houses of Parliament. "Be it enacted by the King's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal in this present Parliament assembled, and by the authority of the same, as follows," the

words "by the authority of the same" having been the latest addition to the formula. The assent of the King to each Act is, by direction of the Lords Commissioners who represent him in the House of Lords, signified by the Clerk of Parliaments, as an officer of the King, in the customary form and manner "Le Roy le veult." And the same Clerk of Parliaments makes himself responsible for the law as promulgated being the law as passed in Parliament by signing two copies of it, specially printed on vellum for the purpose, and deposited in the Victoria Tower and the Record Office respectively.

There remains only the promulgation of law. It is of the greatest importance that laws when made should be promptly published in a form and manner convenient to the general public. In most parts of the British dominions, and in most, if not all,

foreign countries, laws when made, at least those which are important and are of general application, are printed in an official gazette, *bulletin des lois*, or other similar official publication. In the United Kingdom the King's printer is responsible for the printing and publishing of Acts of Parliament. The office of King's Printer is now held by the Controller of the Stationery Office, who acts through the printers with whom he contracts and the publishers whom he employs. He prints and publishes separate copies of each public Act as soon as is practicable after it has received the Royal Assent. He also prints and publishes annually a volume containing the public general Acts of the year, and volumes containing the more numerous and bulky local and personal Acts of the same year, the measures which in their passage through Parliament are known as private bills,

hybrid bills and provisional order confirmation bills. And he publishes annually an index to the public general Acts, and classified lists of the personal and local Acts for the time being in force. This index and these lists were prepared and are annually revised under the directions of the Statute Law Committee. By the help of these volumes the statute law of the country is made as accessible and intelligible to the public as the nature of the subject and of the circumstances permits.

There is a branch of law for the publication of which very insufficient and unsatisfactory provision was made until comparatively recent times. Under modern parliamentary practice, and owing to the exigencies of modern legislation, there is a great and growing mass of what is sometimes called subordinate legislation, that is to say rules and orders made under the

authority of Acts of Parliament and having the force of law. Under arrangements which came into force in 1890 the statutory rules and orders of each year are now officially published in a form corresponding to that of the annual statutes, an index to them is periodically revised and published, and a complete collection of the statutory rules and orders for the time being, corresponding to the edition of the revised statutes, is also periodically revised, edited and published by official authority.

Complaints are sometimes made that the publication of our annual statutes needs a little speeding up, and the difficulty of bringing them out in convenient time has been increased by the practice of holding autumn sittings of the legislature. But on the whole I think that our system works well, at least as compared with the systems of other countries.

I must end, as I began, with an apology for the sketchiness with which I have been compelled to treat a large and complicated subject. My object has been, not to impart information which you could more easily obtain from books and other sources, and of which my own store is very imperfect, but to suggest for your consideration some problems which are of importance to the practising lawyer, as well as to those who are to make, to administer, and to observe the law. Is it too much to hope that the University which is specially bound to reverence the memory of Bentham will produce some one who will worthily continue the work which he began in his treatise on legislation, will advance what he would perhaps have called the science of Nomothetics, and will base it on a careful comparative study of legislative institutions and procedure in different civilized

countries? The materials for such a study have accumulated enormously since Bentham's time, and the study would have to take into account elements of the problem which Bentham and his school were sometimes disposed to overlook or to undervalue, the influence on institutions of historical antecedents, of national and racial idiosyncrasies, of difference in social and economic conditions. And its aim should be to ascertain, not merely how institutions are described on paper, but how they actually work in practice.

I shall be satisfied if I have indicated by my confessions of ignorance a field in which, though much has been done, much still remains to be done, by those who are interested in that branch of comparative jurisprudence which is specially concerned with legislation.

APPENDIX

METHODS OF LEGISLATION IN FOREIGN COUNTRIES

I APPEND a list of some books which might be found useful by a student of legislative methods in foreign countries. For the names of some of them I am indebted to my friend Professor Redlich.

General.

DUPRIÈZ: Les ministres dans les principaux pays d'Europe et d'Amérique.

LOWELL: Governments and Parties in Continental Europe.

BRYCE: Studies in Jurisprudence, especially Essay II in vol. i.

France.

PIERRE, EUGÈNE: Traité de droit politique electoral et parlementaire. Paris, 1893. Supplemental volume, 1906.

ESMEIN: Éléments de droit constitutionnel.

Germany and Austria.

1. *Theory*—

LABAND: Deutsches Staatsrecht. (Also in French, under the title *Le droit public de l'Empire Allemand.*)

JELLINEK: Gesetz und Verordnung.

2. *Parliamentary Procedure*—

German Reichstag.

PERELS: Das autonome Reichstagsrecht. Berlin: Mittler, 1903.

WEISS: Der deutsche Reichstag und seine Geschäftsordnung. Berlin, 1906.

Prussia.

RÖNNE: Das Staatsrecht der preussischen Monarchie, herausg. von Prof. Zorn. Leipzig, 1899.

PLATE: Die Geschäftsordnung des preussischen Abgeordnetenhauses. Berlin, 1904.

Würtemberg.

MOHL: Staatsrecht d. Königsr. Würtemberg.

Austria.

NEISSER: Die Geschäftsordnung des Abgeordnetenhauses des Reichrates, 1909. (Contains also standing orders or réglements of English, French and Belgian legislatures.)

Belgium.

ERRERA: Das Staatsrecht d. Königsr. Belgien. Tübingen, 1909.

United States.

BRYCE: American Commonwealth.

WOODROW WILSON: Congressional Government.

HINDS (ASHER C.): Digest and Manual of the Rules and Practice of the House of Representatives. (An official publication.)

Printed for the UNIVERSITY OF LONDON PRESS, Ltd., by RICHARD CLAY & SONS, Ltd., London and Bungay.